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No. 03-867

In the Supreme Court of the United States

CF INDUSTRIES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Harbor Maintenance Tax (HMT), 26 U.S.C. 4461-4462, as applied to domestic shipping, violates the Uniformity Clause, U.S. Const. Art. I, § 8, Cl. 1.

2. Whether the HMT, as applied to domestic shipping, violates the Port Preference Clause, U.S. Const. Art. I, § 9, Cl. 6.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A20) is reported at 340 F.3d 1355. The opinion of the Court of International Trade (Pet. App. A21-A23) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 18, 2003 (Pet. App. A1). On November 10, 2003, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 16, 2003, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Harbor Maintenance Tax (HMT) as part of the Water Resources Development Act (WRDA) of 1986, Pub. L. No. 99-662, 100 Stat. 4082 (33 U.S.C. 2201 *et seq.*). The HMT imposes a fee "on any port use" by commercial importers, exporters, domestic shippers, and passenger liners. 26 U.S.C. 4461(a). For shipments of goods, the amount of the HMT is set at "0.125 percent of the value of the commercial cargo involved." 26 U.S.C. 4461(b). The purpose of the HMT is to require the entities that benefit from use of port facilities to share the burden of the costs borne by the United States in maintaining those facilities. See, *e.g.*, S. Rep. No. 126, 99th Cong., 1st Sess. 3-4 (1985). The fees collected by the United States are paid into the Harbor Maintenance Trust Fund and thereafter expended on the operation and maintenance of channels and harbors throughout the United States. 26 U.S.C. 9505(a) and (c).

2. In *United States* v. *United States Shoe Corp.*, 523 U.S. 360 (1998), this Court held that the HMT, as applied to shipments of exports, violates the Export Clause, which states that "[n]o Tax or Duty shall be laid on Articles exported from any State." U.S. Const. Art. I, § 9, Cl. 5. The Court recognized that the Export Clause imposes no bar against an appropriate port use fee (523 U.S. at 367), and emphasized that exporters are not "exempt from any and all user fees designed to defray the cost of harbor development and maintenance" (*id.* at 370). The Court held that *Pace* v. *Burgess*, 92 U.S. 372 (1876), governs the determination whether an assessment "constitutes a bona fide user fee in the Export Clause context." 523 U.S. at 369. The Court explained that the more flexible test for identify-

ing user fees applied in *Massachusetts* v. *United States*, 435 U.S. 444 (1978), is applicable under "constitutional provisions other than the Export Clause," because "the Export Clause's simple, direct, unqualified prohibition on any taxes or duties distinguishes it from other constitutional limitations on governmental taxing authority." 523 U.S. at 368.

The Court concluded that the HMT, as applied to exports, fails to satisfy the strict test for a bona fide user fee applicable under the Export Clause, because the value of a shipment's cargo, which determines the amount of the HMT, does not adequately correlate with the extent to which an exporter uses federal harbor services, facilities, and benefits. 523 U.S. at 367-370. The Court therefore held that the HMT, as applied to exports, is a tax barred by the Export Clause. *Ibid.* The Court recognized, however, that *ad valorem* assessments that amount to an invalid "tax or duty" under the Export Clause might nonetheless qualify as a valid user fee under other constitutional provisions. *Id.* at 368-369 (citing, *inter alia*, *United States* v. *Sperry Corp.*, 493 U.S. 52, 60 (1989), which upheld an *ad valorem* fee against a Takings Clause challenge on the ground that the Court has "never held that the amount of a user fee must be precisely calibrated to the use that a party makes of Government services").

3. Petitioner, a Florida manufacturer of fertilizer, pays the HMT when its shipments of fertilizer are shipped to Davant, Louisiana, and unloaded there to be placed on river barges. Pet. App. 22a. On April 10, 2002, petitioner filed this action in the Court of International Trade, alleging that the HMT, as applied to domestic shipments, violates the Uniformity Clause, U.S. Const. Art. I, § 8, Cl. 1, and the Port Preference Clause, U.S. Const. Art. I, § 9, Cl. 6. Pet. 4. On Novem-

ber 26, 2002, the court granted judgment in favor of the government, Pet. App. 21a-23a, relying on its previous decision in *Thomson Multimedia, Inc.* v. *United States*, 219 F. Supp. 2d 1322 (Ct. Int'l Trade 2002), aff'd, 340 F.3d 1355 (Fed. Cir. 2003), petition for cert. pending, No. 03-882 (filed Dec. 16, 2003), which had rejected analogous challenges to the HMT brought by an importer.

a. The Uniformity Clause states that "all Duties, Imposts and Excises shall be uniform throughout the United States." U.S. Const. Art. I, § 8, Cl. 1. Petitioner argued that the HMT, as applied to domestic shipping, is a tax subject to the Uniformity Clause rather than a user fee, and that the HMT is not "uniform" under the Clause because it contains a limited exemption for unloading of domestic consumable merchandise (excluding Alaskan crude oil) shipped between the continental United States and Alaska, Hawaii, or United States possessions, 26 U.S.C. 4462(b). In its opinion in *Thomson*, the Court of International Trade ruled that the HMT, as applied to imports, constitutes a tax rather than a bona fide user fee. 219 F. Supp. 2d at 1325. But the court concluded that the HMT's application to imports nonetheless does not infringe the Uniformity Clause because there was no evidence of actual regional favoritism or discrimination with respect to the exemption for domestic cargo shipped between the continental United States and Alaska, Hawaii, or United States territories. *Id.* at 1327-1328. The court adhered to that ruling in this case in rejecting petitioner's claim under the Uniformity Clause. Pet. App. 22a.

b. In *Thomson*, the court also rejected a claim that the HMT's domestic cargo exemption for Alaska, Hawaii, and United States territories violates the Port Preference Clause, which states that "No Preference

shall be given * * * to the Ports of one State over those of another," U.S. Const. Art. I, § 9, Cl. 6. See 219 F. Supp. 2d at 1331-1332. The court held that any benefit or detriment to the ports of certain States as a result of the domestic cargo exemption does not amount to illicit geographic discrimination between States in violation of the Port Preference Clause. *Ibid.* As with petitioner's claim under the Uniformity Clause, the court in this case adhered to *Thomson* in rejecting petitioner's claim under the Port Preference Clause. Pet. App. 22a.

4. The court of appeals affirmed. Pet. App. 2a-20a.[1]

a. The court of appeals held that the HMT, as applied to domestic shipping, does not violate the Uniformity Clause. Pet. App. 8a-15a. Whereas the Court of International Trade had found in *Thomson* that the HMT is a tax subject to the Uniformity Clause but does not run afoul of the Clause's uniformity standard, the court of appeals concluded that the HMT's application to domestic shipping is a bona fide user fee rather than a tax and thus falls outside the scope of the Clause altogether. The court of appeals, relying on this Court's opinion in *United States Shoe*, reasoned that because this case does not involve a challenge under the Export Clause, the less stringent standard for a bona fide user fee prescribed by *Massachusetts*, 435 U.S. at 464, governs the analysis. Pet. App. 9a-10a. Observing that "*ad valorem* charges are generally upheld in contexts outside of the Export Clause," the court concluded "that the HMT's *ad valorem* charge is based upon a fair

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[1] The court of appeals issued a single opinion resolving both the appeal in this case and the appeal in *Thomson*. Thomson filed a separate petition for a writ of certiorari on December 16, 2003 (No. 03-882), and the government has filed a brief in opposition to that petition.

approximation of the costs of the benefits provided for port users." *Id.* at 12a-13a. Having found that the HMT, as applied to domestic shipping, constitutes a bona fide user fee, the court had no occasion to address the substantive scope of the Uniformity Clause.

b. The court of appeals also upheld the HMT's application to domestic shipping against petitioner's challenge under the Port Preference Clause. Pet. App. 15a-20a. The court explained that the Port Preference Clause "prohibits only intentional, effectual preference of the ports of one state over ports of another state, advantaging certain states' ports by disadvantaging other states' ports." *Id.* at 17a. The court held that the HMT's domestic cargo exemption for Alaska, Hawaii, and United States possessions does not infringe the Port Preference Clause, because it was "clear that the intent and effect of the exemption was not to provide a preference to the ports of the exempted states at the expense of the ports of other states, but rather to provide some relief from the disparate effects the HMT would have had on shipping-dependent states and possessions." *Id.* at 19a. The court further explained that the exemption applies not only in the ports of Alaska and Hawaii, but also in the ports of any state when receiving shipments from Alaska and Hawaii. The court thus found it "difficult to discern an actual preference" for the ports of those States, as opposed to a recognition "that the ports of both states are geographically isolated and as such are more heavily dependent on domestic shipping to receive goods." *Ibid.*[2]

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[2] The court observed that there was no significance to the fact that the HMT singles out Alaska and Hawaii by name, explaining that naming the two States (as well as United States possessions) "merely served as a

ARGUMENT

The court of appeals correctly held that the HMT, as applied to domestic shipping, falls outside the scope of the Uniformity Clause because it qualifies as a user fee for purposes of that Clause, and that the HMT's exemption for domestic cargo (excluding Alaskan crude oil) shipped to and from Alaska, Hawaii, and United States possessions does not violate the Port Preference Clause. The decision of the court of appeals does not conflict with any decision of this Court or any other court of appeals. Further review therefore is unwarranted.

1. Petitioner contends (Pet. 8-25) that the HMT, as applied to domestic shipping, is a tax subject to the Uniformity Clause rather than a bona fide user fee. That contention lacks merit and was correctly rejected by the court of appeals.

a. Congress intended for the HMT to be a user fee rather than a tax. See, *e.g.*, S. Rep. No. 126, 99th Cong., 1st Sess. 7 (1985) ("The taxes and fees in this legislation are not for the purpose of raising revenue. Rather, they are to repay costs related directly to the servicing of commerce. These fees and taxes offset services rendered to vessels.").[3] Because this case concerns the application of the HMT to domestic shipping rather than to exports, the court of appeals, following this

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proxy for a complex formula defining excessive isolation causing a greater dependency on domestic cargo than that experienced by other coastal states." Pet. App. 20a.

[3] Although the HMT is referred to as a "tax," 26 U.S.C. 4461, that of course is not dispositive of whether the HMT qualifies as a bona fide user fee. See *United States Shoe*, 523 U.S. at 367 ("[W]e must regard things rather than names * * * in determining whether an imposition on exports ranks as a tax.") (citation and internal quotation marks omitted).

Court's direction in *United States Shoe*, 523 U.S. at 367-368, applied the framework prescribed by *Massachusetts* v. *United States*, 435 U.S. 444 (1978), for determining (outside the context of the Export Clause) whether an assessment constitutes a bona fide user fee. See pp. 2-3, *supra*. The *Massachusetts* test provides that assessments constitute valid user fees "so long as they (1) do not discriminate against [the constitutionally-protected interest], (2) are based upon some fair approximation of use, and (3) are not shown to be excessive in relation to the cost to the government of the benefits conferred." 435 U.S. at 464. The court of appeals correctly found that the HMT, as applied to domestic shipping, satisfies each prong of the test, Pet. App. 10a-15a, and petitioner makes no argument in this Court that the court of appeals erred in how it applied the *Massachusetts* framework.

With respect to the first prong, the court of appeals found that the HMT charge itself could not "be viewed as discriminating against any constitutionally-protected interest" because "it is only the exemptions in the HMT that possibly implicate either" the Uniformity or Port Preference Clauses. Pet. App. 10a-11a. With respect to the second prong, the court explained that "a user fee must only 'reflect a fair, if imperfect, approximation of the use of facilities.'" *Id.* at 12a (quoting *Evansville-Vanderburgh Airport Auth. Dist.* v. *Delta Airlines, Inc.*, 405 U.S. 707, 717 (1972)). That standard was met by the HMT's *ad valorem* charge as applied to domestic shipping, the court explained, because Congress heard "much testimony in favor of an *ad valorem* charge" over other charges, Congress found that an *ad valorem* charge would "minimize administrative costs," and, although the uniform *ad valorem* charge is "imperfect in its application, Congress rationally determined that

[it] was 'the only acceptable basis on which to impose such charges'" because it "minimizes any possible disadvantages among cargo types and U.S. ports which otherwise might result from user charges." *Id.* at 13a (quoting H.R. Rep. No. 228, 99th Cong., 2d Sess. 5-6 (1986)). Finally, with respect to the third prong, the court explained that the HMT is not excessive in relation to the cost of the federal services, because, as with other assessments upheld by this Court as user fees, HMT collections are deposited in a designated trust fund and can be used only for the operation and maintenance of harbors and channels. Pet. App. 14a.

b. Petitioner asserts (Pet. 9-13) that the holding of this Court in *United States Shoe* that the HMT, as applied to exports, constitutes a tax rather than a bona fide user fee under the Export Clause, is controlling in this case in determining whether the HMT, as applied to domestic shipping, qualifies as a valid user fee under the Uniformity Clause. That contention lacks merit.

The Court made clear throughout its opinion in *United States Shoe* that its analysis applied only under the Export Clause. Indeed, the Court specifically emphasized that the "Export Clause's simple, direct, unqualified prohibition on any taxes or duties distinguishes it from other constitutional limitations on governmental taxing authority." 523 U.S. at 368. The Court therefore applied *Pace* v. *Burgess*, 92 U.S. 372 (1876), "[t]he guiding precedent for determining what constitutes a bona fide user fee *in the Export Clause context*." 523 U.S. at 369 (emphasis added). The Court ultimately concluded that "*Pace* establishes that, *under the Export Clause*, the connection between a service the Government renders and the compensation it receives * * * must be closer than is present here" in order for the charge to qualify as a bona fide user fee.

Ibid. (emphasis added). That conclusion was explicitly confined to the particular context of claims arising under the Export Clause, and it has no application here. In cases involving "constitutional provisions other than the Export Clause," *id.* at 368, the *Massachusetts* framework determines whether an assessment constitutes a valid user fee.

Petitioner claims (Pet. 11, 13-18) that, if a charge when applied to exports is a "tax" prohibited by the Export Clause rather than a bona fide user fee, the same charge when applied to domestic shipments is necessarily a "duty" subject to the Uniformity Clause rather than a permissible user fee. That is incorrect. This Court has "consistently recognized that the interests protected by [constitutional provisions limiting the taxing power] are not offended by revenue measures that operate only to compensate a government for benefits supplied." *Massachusetts*, 435 U.S. at 462. And the Court made clear in *United States Shoe* that, when Congress intends for an assessment to constitute a user fee, there must be a closer relationship between the charge and the service supplied to satisfy the strict test that applies under the Export Clause than under the more flexible *Massachusetts* test that controls when applying other constitutional provisions. See 523 U.S. at 367-369; *id.* at 368 ("Export Clause's simple, direct, unqualified prohibition on any taxes or duties distinguishes it from other constitutional limitations on governmental taxing authority.").

The Court's opinion in *United States* v. *IBM*, 517 U.S. 843, 857 (1996), is instructive. Petitioner's argument here (Pet. 14-15) is that the term "tax" in the Export Clause is broader than (and inclusive of) the terms "duty," "impost," and "excise" in the Uniformity Clause. In *IBM*, this Court rejected an analogous

argument concerning the relationship between the term "tax" in the Export Clause and the terms "duty" and "impost" in the Import-Export Clause, U.S. Const. Art. I, § 10, Cl. 2. The Court explained that its decisions have "left open the possibility that a particular state assessment might not properly be called an impost or duty, and thus would be beyond the reach of the Import-Export Clause, while an identical federal assessment might properly be called a tax and would be subject to the Export Clause." 517 U.S. at 857.[4]

c. According to petitioner (Pet. 18-23), the court of appeals' holding that the HMT as applied to domestic shipping is a valid user fee under the Uniformity Clause will have substantial adverse implications for administration of the federal budgeting process and the legislative process related to enactment of federal revenue laws. That argument is baseless.

The allegedly adverse consequences identified by petitioner—such as the purported implications for

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[4] Petitioner also errs in claiming (Pet. 16-17) that the Export Clause and Uniformity Clause reach the same category of assessments because the two clauses share a "common function and history." Petitioner relies (Pet. 17) on language in this Court's decision in *IBM* explaining that, "[a]s a purely historical matter the Export Clause was originally proposed by delegates to the Federal Convention from the Southern States, who feared that the Northern States would control Congress and would use taxes and duties on exports to raise a disproportionate share of federal revenues from the South." 517 U.S. at 859. The Court later explained, however, that "[w]hile the original impetus may have had a narrow focus, the remedial provision that ultimately became the Export Clause does not, and there is substantial evidence from the Debates that proponents of the Clause fully intended the breadth of scope that is evident in the language." *Id.* at 859-860. The close scrutiny that this Court applies when assessing whether a particular charge is a bona fide user fee in the context of the Export Clause reflects the unique breadth of that Clause. *United States Shoe*, 523 U.S. at 368-369.

federal deficit accounting, for the extent to which imposition of the assessment can be delegated to an agency, and for the proper legislative procedures for raising and enacting the revenue laws—are consequences that chiefly would be felt in (and could be rectified by) Congress. And Congress, as explained, intended for the HMT to be a user fee, not a general revenue-raising tax. See p. 7, *supra*. Moreover, insofar as petitioner means to suggest (Pet. 18) that those consequences are magnified if the HMT is treated as a tax for purposes of the Export Clause but a user fee for purposes of the Uniformity Clause, the short answer is that Congress specifically made the HMT subject to a severability clause, under which Congress made clear its intention that the invalidation of certain applications of the HMT would not affect the remaining applications. See 33 U.S.C. 2304. The court of appeals, relying on prior decisions, thus held that HMT's invalid application to exports should be severed from its remaining applications, including to domestic shipping. Pet. App. 6a-8a; see *Carnival Cruise Lines, Inc.* v. *United States*, 200 F.3d 1361, 1369 (Fed. Cir.), cert. denied, 530 U.S. 1274 (2000). Petitioner raises no challenge to that aspect of the court of appeals' decision.

d. In any event, even if the HMT, as applied to domestic shipping, constituted a tax subject to the Uniformity Clause, the result below would not change. As the Court of International Trade correctly concluded, the HMT's application to domestic shipping does not violate the Uniformity Clause's requirements. Pet. App. 22a-23a.

"The Uniformity Clause gives Congress wide latitude in deciding what to tax and does not prohibit it from considering geographically isolated problems." *United States* v. *Ptasynski*, 462 U.S. 74, 84 (1983). The Clause

was intended to prevent "the national government [from] us[ing] its power over commerce to the disadvantage of *particular States*." *Id.* at 81 (emphasis added). In a case involving assessments at ports, the prohibition of the Uniformity Clause against discrimination in favor of (or against) particular States mirrors the prohibitions of the Port Preference Clause. See *Knowlton* v. *Moore*, 178 U.S. 41, 106 (1900) ("[T]he preference clause of the Constitution and the uniformity clause were, in effect, in framing the Constitution, treated, as respected their operation, as one and the same thing, and embodied the same conception."). See also *Ptasynski*, 462 U.S. at 81 n.10. Accordingly, the HMT as applied to domestic shipping is valid under the Uniformity Clause for the same reasons that it is valid under the Port Preference Clause. See pp. 13-17, *infra*. Indeed, the Court's rejection in *Ptasynski* of a Uniformity Clause challenge to an exemption for certain Alaskan oil from the coverage of a general tax on crude oil should foreclose petitioner's challenge to a comparable exemption under the HMT for domestic cargo shipments to and from Alaska, Hawaii, and United States territories. See pp. 15-16, *infra*.

2. Petitioner argues (Pet. 26-29) that the HMT's provisions, as applied to domestic shipments, entail an invalid preference for the ports of certain States in violation of the Port Preference Clause. The court of appeals correctly rejected that claim.

The Port Preference Clause provides that "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another." U.S. Const. Art. I, § 9, Cl. 6. The Clause "has never been relied upon by the federal judiciary to hold an act of Congress unconstitutional." *Kansas* v. *United States*, 16 F.3d 436, 439 (D.C. Cir.), cert. denied, 513

U.S. 945 (1994). As this Court has established, "what is forbidden" by the Clause is "not discrimination between individual ports within the same or different States, but discrimination *between States*." *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 435 (1855) (emphasis added). The Court has also made clear that the Clause imposes no bar against a facially non-discriminatory law that has incidental, disparate effects on ports of one or more states. See, *e.g.*, *id.* at 433-436; *Armour Packing Co.* v. *United States*, 209 U.S. 56, 80 (1908); *Louisiana Pub. Serv. Comm'n* v. *Texas & New Orleans R.R.*, 284 U.S. 125, 131 (1931).

Petitioner argues (Pet. 27-29) that the HMT, as applied to domestic shipping, violates the Port Preference Clause because of the HMT's exemption for domestic shipments between the continental United States and Alaska, Hawaii, and United States territories. See 26 U.S.C. 4462(b). That exemption does not violate the Port Preference Clause. There is no indication that the exemption was intended as an illicit preference for the States of Alaska and Hawaii (and United States territories) over other States. To the contrary, "Congress crafted a narrow exemption to alleviate a disproportionate incidence of the tax on Alaska and Hawaii as a result of their heavy reliance on domestic shipping," due to their "vast geographical separation" from the continental United States. Pet. App. 18a. Alaska and Hawaii thus enjoy no exemption from the HMT with respect to *international* shipments passing through their ports. See 26 U.S.C. 4462(b)(1). Moreover, the fact that the exemption encompasses United States possessions as well as Alaska and Hawaii confirms that it is grounded in concerns about the burdens of geographic separation rather than an invalid preference for the ports of specific States.

Indeed, the exemption applies not just to ports in Alaska and Hawaii when receiving shipments from the continental United States, but also to ports in *any* State when receiving shipments from Alaska and Hawaii. 26 U.S.C. 4462(b)(1)(A)-(C). Because all ports in all States are exempt from the HMT with respect to the unloading of domestic cargo (other than Alaskan crude oil) shipped to or from Alaska and Hawaii, the exemption is not in fact one for the ports of Alaska and Hawaii alone, but is one for a certain class of merchandise, wherever the associated port use occurs. That the exemption may incidentally benefit the ports of certain States (Alaska, Hawaii, and other States where domestic consumables subject to the exemption are unloaded) does not infringe the Port Preference Clause. See *Armour*, 209 U.S. at 80; *Louisiana Pub. Serv. Comm'n*, 284 U.S. at 131. In short, it "is clear that the intent and effect of the exemption was not to provide a preference for the ports of the exempted states at the expense of the ports of other states, but rather to provide some relief from the disparate effects the HMT would have had on the shipping-dependent states and possessions." Pet. App. 17a-18a.

That analysis is supported by this Court's decision in *Ptasynski*, 462 U.S. at 74. There, the Court upheld under the Uniformity Clause a provision exempting certain oil produced in Alaska from the coverage of a general tax on crude oil. The Court explained that the Clause does not "prohibit all geographically defined classifications" and "does not prohibit [Congress] from considering geographically isolated problems." *Id.* at 84. The Court upheld the exemption for certain oil produced in Alaska because of "the disproportionate costs and difficulties * * * associated with extracting oil from this region." *Id.* at 85. The Court explained

that "[n]othing in the Act's legislative history suggests that Congress intended to grant Alaska an undue preference at the expense of other oil-producing States." *Id.* at 86. In this case, likewise, the HMT's exemption for domestic shipments to and from Alaska and Hawaii addresses "geographically isolated problems" (*id.* at 84) rather than manifesting an "undue preference at the expense of other" States (*id.* at 86). See *City of Houston* v. *FAA*, 679 F.2d 1184, 1197 (5th Cir. 1982) ("Government actions do not violate the [Port Preference] Clause even if they result in some detriment to the port of a state, where they occur * * * more as a result of the accident of geography than from an intentional government preference.").

The domestic cargo exemption related to Alaska and Hawaii (and United States territories) thus is a far cry from the "paradigm evil the [Port Preference] Clause was explicitly designed to prevent"—"a federal law requiring ships sailing to Baltimore to first enter and clear at Norfolk." *Kansas* v. *United States*, 16 F.3d at 439; see *United States* v. *Lopez*, 514 U.S. 549, 587 (1995) (Thomas, J., concurring) ("Although it is possible to conceive of regulations of manufacturing or farming that prefer one port over another, the more natural reading is that the [Port Preference] Clause prohibits Congress from using its commerce power to channel commerce through certain favored ports."). In view of the geographic isolation of Alaska and Hawaii, it is "difficult to imagine domestic shippers deliberately routing cargo to a port in Alaska or Hawaii as an intermediate stop * * * in order to avoid HMT liability." Pet. App. 19a. It therefore "is hard to view this exemption as one that will channel commerce through the ports of one state to the detriment of the ports in other states." *Ibid.*

The court of appeals' careful analysis of whether the domestic cargo exemption for Alaska, Hawaii, and United States possessions constitutes an illicit preference for certain states belies petitioner's contention that the court's analysis "gut[s] the protections of the Port Preference Clause." Pet. 27. Petitioner asserts (*ibid.*) that Congress would rarely "leave evidence that it distinguished between states for the nefarious purpose of 'favoring' some states at the expense of others." But the court of appeals carefully examined the purpose of the exemption and its operative effect before concluding that "the intent and effect of the exemption was not to provide a preference to the ports of * * * Alaska and Hawaii at the expense of the ports of other states." Pet. App. 19a; cf. *Ptasynski*, 462 U.S. at 85 ("[W]here Congress * * * choose[s] to frame a tax in geographic terms, we will examine the classification closely to see if there is actual geographic discrimination."). There is no warrant for granting review of that holding.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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